such evidence.[13] In one of the cases,[14] it was said: "Proof of previous acts of sexual intercourse would tend to show a much greater probability of the commission of a similar act charged to have occurred subsequent thereto, but the converse of this proposition would not be true, as the proof of a crime committed by parties on a certain day could have no tendency to prove that they had, previous thereto, committed a similar offense."

I. B.

MORTGAGES—MERGER—SUBROGATION—In a recent English case of involved facts the time-honored rule of merger was applied in spite of the fact that the case arose in chancery, where the oft expressed doctrine that equity looks with disfavor on merger originated.[1] As is too often the case, if one is to believe the decision, the outcome was due to the "stupid ingenuity" of the unsuccessful litigant's solicitor. In order to transfer a mortgage and the equity of redemption at the same time to separate parties, the defendants in this action, the mortgagee deeded back the premises to the mortgagor, which is necessary under the English theory of the mortgage. The mortgagor then conveyed by warranty deed to one of the defendants, who in turn executed a mortgage to the other defendant for the same amount as the replaced encumbrance. The three deeds were executed within the space of forty-eight hours. There was a second mortgage unknown to all the parties but the original mortgagor. It was held that the second mortgagee was entitled to priority. At first blush this would seem a clear case of extinguishment. The debtor has paid his debt, the mortgage is cancelled and the second lien arises to a new dignity. That a mortgagor cannot set up one mortgage which he has discharged against a later one of his own making is legal gospel.[2] A reason frequently

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[13] Pope v. State, 137 Ala. 56 (1903); State v. Markins, 95 Ind. 464 (1884); People v. Fowler, 104 Mich. 449 (1895); St. v. Palmberg, 199 Mo. 233 (1906); People v. Robertson, 88 N. Y. App. Div. 198 (1903); Smith v. State, 44 Tex. Cr. 137 (1902).

Admitted in Crane v. People, 168 Ill. 397 (1897); Com. v. Nichols, 114 Mass. 285 (1873); State v. Witham, 72 Maine 531 (1881); State v. Robertson, 121 N. C. 551 (1897); State v. Bridgman, 49 Vt. 202 (1876).

[14] People v. Clark, 33 Mich. 112, 115 (1876).

[1] Manks v. Whitely, 81 L. J. Ch. D. 457 (1912), reversing the decision of Parker, J., 80 L. J. Ch., 696 [1911], Fletcher-Moulton, L. J., dissenting.

[2] Otter v. Vaux, 6 De G. M. and G. 638 (Eng., 1858); Lewin on Trusts, Vol. 2 (8th Ed.), § 728; Pomeroy, Eq. Juris., Vol. 2, § 797. Purchase of mortgage by trustee in bankruptcy of mortgagor does not existinguish it, Brown v. Lapham, 3 Cush. 551 (Mass., 1849). The mortgagor's payment of the mortgage does not extinguish it as to a purchase, from him, of the equity of redemption, Stillman v. Stillman, 21 N. J. Eq. 126 (1870); Stanhope's Estate, 184 Pa. 414 (1898).

If a purchaser of the equity of redemption personally assumes the mortgage, an assignment of it to him operates as an extinguishment, Burke v. Abbot, 109 Ired. 1 (S. C., 1885); McCabe v. Swap, 14 Allen 188 (Mass., 1867); Jones, Mortgages, § 864. *Contra*, Young v. Morgan, 89 Ill. 199 (1878). On the other hand, subrogation was allowed when the premises were sold subject to

given for this rule is that the second mortgagee contracts for that privilege which belongs to every encumbrancer whether he acquires his lien by contract or by judgment or statute. The rule is nothing more than an application of the legal as well as moral commandment that one must pay his debts.

There are reasons, however, which certainly would seem to justify a suspension of the rule in this case. The mortgagor did not in reality pay his debt. He was unable to pay it and induced the defendants to take the property. Before the three deeds were executed the defendants paid the first mortgagee the amount of his claim, the defendant mortgagee providing the amount of the principal sum. Subsequently the defendant mortgagor paid the balance of the purchase price. This appears to be nothing more than a purchase of the mortgage and of the equity of redemption separately, In fact the court seems to have treated it as such and a majority concluded that even then the second mortgagee was entitled to priority. The decision was based on the theory of merger which is, in brief, that where two interests unite in the same the lesser sinks into the greater. But against this rule of law equity will give relief where there is an intention on the part of the person holding the two interests to keep them separate. This intention may be manifested by his acts and conduct or, in the absence of express intention, it will be presumed from the position of the dual owner. If it would be against his interest to permit a merger then the presumption is that he intended to keep the two separate.[3] In the absence of any intention the courts will apply the rule of law, and, in the case under discussion, it was said that inasmuch as there was no intention expressed, nor could one be presumed, merger must follow. The reason given for refusing to presume an intention to keep separate was that although it was manifestly to the defendants' interest to keep the two estates apart, nevertheless since they were ignorant of the fact there must have been an intent to merge and that this intent once formed cannot be changed. Certainly this is good logic, but hardly called for under the circumstances and in view of the evident preponderance of equity in favor of the defendants. In at least one American jurisdiction, the court considers this presumption of intention a rule of law and holds that there will never be a merger where it is contrary to the owner's interest, whether he knew of that interest or not.[4] On the other hand it has been held that so long as third parties who acquire their rights subsequently to the union of the two estates are not affected, the time for the presumption of an intention is ex-

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the mortgages and the purchaser paid the mortgage debt. Barnes v. Mott, 64 N. Y. 397 (1876); Capitol Nat'l. Bank v. Holmes, 43 Col. 154 (1908); Ryer v. Gass, 130 Mass. 227 (1888). So where one of two joint mortgagors pays the debt, the mortgage is not extinguished. Duncan v. Drury, 9 Pa. 332 (1848); Saint v. Cornwall, 207 Pa. 270 (1903).

[3] Forbes v. Moffatt, 18 Ves. Jr. 384, (1811); James v. Morey, 2 Cow. 246 (N. Y., 1823).

[4] Stanton v. Thompson, 49 N. H. 272 (1870).

tended, just as it is in the case of an actual intention expressed.[5] The decision of the principal case was based on *Toulmin* v. *Steere*,[6] a case which has been criticized by text writers and confined by the cases to its peculiar facts.[7]

The counsel and court did not discuss the question whether or not the first mortgage could not be revived by means of the equity of subrogation. This would hinge primarily on the interpretation of the transactions of the parties. If the payment to the first mortgagee should be considered as made by the mortgagor with money loaned him by the defendants then the latter would not be entitled to substitution unless they had expressly contracted for that right. It would not be sufficient to presume such a "conventional" subrogation if they accepted another mortgage believing that it was the only lien.[8] Subrogation is based on the theory that there has been an equitable assignment arising from an express contract of the parties or from the fact that the present claimant had some interest in the property which he attempted to protect by discharging the first lien.[9] But the mere fact that one's loan has been used to pay off a mortgage does not entitle one to subrogation.

Assuming however that the payment to the first mortgagee was made directly by the defendants, so as to create in them an equitable right in the mortgage, would the subsequent reconveyance by the first mortgagee, their trustee, with their consent, work an extinguishment, so as to give the plaintiff priority? There are several American cases which reach a negative conclusion.[10] They state the law to be that where the mortgagee has accepted a new mortgage and surrendered his prior security or has satisfied it of record he will be entitled to a revival of his lien if there was another encumbrance of which he had no actual notice at the time, although the latter was on record; and in so holding they have devised a

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[5] Howard v. Clark, 71 Vermont 424 (1899); Brooks v. Rice, 56 Cal. 428 (1880). And the fact that the second mortgage was on record makes no difference. Shaffer v. McCloskey, 101 Cal. 576 (1894).

[6] 3 Merivale 210 (1817). There was constructive notice in this case, not by record, but through actual knowledge on part of purchaser's solicitor. Mocatto v. Murgatryod, 1 P. Wms. 393 (1717); Greshold v. Graham, 2 Ch. Cases 170 (1685). And in the latter case it was held that as to liens of which the purchaser had no notice, he was entitled to priority.

[7] Pomeroy, Vol. 2, § 791, note; Lewin, *729, *729, notes; Stevens v. Mid-Hants Ry. Co., L. R. 8 Ch. App. 1064 (1873); Thorn v. Conn., 64 L. J. Ch. 1 (1895); Adams v. Angell, 46 L. J. Ch. 352 (1877); Liquidation, etc. Co. v. Willoughby, 67 L. J. Ch. 252 (1898).

[8] Nelson v. McKee, 99 N. E. Rep. 447 (Ind., 1912); Frederick v. Gehrling, 137 N. W. Rep. 998 (Neb., 1912); Suley v. Bacon, 34 Atl. Rep. 139 (N. J. Ch., 1896); Sash, etc. Co. v. Case, 42 Neb. 281 (1894).

[9] 3 Pom., § 1212.

[10] Jones, § 971, Sheldon Subrogation, § 19 and cases cited there; Bruse v. Nelson, 35 Ia. 157 (1872); Campbell v. Trotter, 100 Ill. 281 (1881); but when the mortgagee has actual notice of the other lien and cancels his old mortgage accepting a new one he loses his priority, Attkinson v. Plumb, 50 W. Va. 104 (1901).

new ground for subrogation, *i. e.*, mistake. They presume that the mortgagee would not have so acted had he known the whole truth. That the same is the rule in England would appear from a case which held that a mortgagee did not lose his priority by reconveying and accepting other security which was a charge on the land.[11] That case was not called to the attention of the court in the principal case.

J. S. B.

PROPERTY—FIXTURES—AS BETWEEN TENANT AND MORTGAGEE—In *Equitable Guarantee & Trust Company* v. *Hukill*,[1] an injunction was asked by a mortgagee of land to restrain the removal of buildings erected by a tenant of the mortgagor. The tenant occupied the premises under a lease which expressly gave him authority to erect frame structures for the storage of lumber in the course of his business and to remove them during the term. The tenant being about to remove the buildings so erected, this suit was brought before the expiration of his term, and before a foreclosure of the mortgage. In dismissing the bill, the court held that under these circumstances, as it was not shown that the original security would be impaired, the tenant might remove the buildings as against the prior mortgagee of his landlord.

In spite of the old maxim, *quicquid planatur solo, solo cedit*, the exceptional right of the tenant to remove fixtures annexed for the purposes of trade has long been recognized,[2] and it may be stated generally that the tenant is permitted to remove chattels annexed to the realty of his landlord, which were so placed for purposes of trade, provided that such annexed articles are removable without material injury to the freehold.[3] As between mortgagor and mortgagee, however, the old, stricter rule has been applied, and a mortgagor may not remove fixtures which he has attached to the freehold subsequent to the mortgage, as against his mortgagee. That such fixtures have been attached for trade purposes seems to be immaterial.[4]

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[11] Stevens v. Mid-Hants Ry. Co., L. R. 8 Ch. App. 1064 (1874).

[1] 85 Atl. Rep. 60 (Del., 1912).

[2] See Henry's case, Y. B. 20 Hen. VII, 13, pl. 24 (1505); Poole's Case, Salk. 368 (1703).

[3] Elwes v. Maw, Salk. 368 (1703); Whitehead v. Bennett, 27 L. J. Ch. 474 (1858); Doty v. Gorham, 5 Pick. 487 (Mass., 1827); Van Ness v. Packard, 2 Pet. 137 (1829); Holbrook v. Chamberlin, 116 Mass. 155 (1874); see also Collamore v. Gillis, 149 Mass. 578 (1889); Wiggins Perry Company v. O. and M. Railway, 142 U. S. 396 (1891); Ewell on Fixtures, Second Edition, pp. 121, 126; Amos & Ferrard on Fixtures, Third Edition, pp. 40 *et seq.*; 2 Tiffany, Landlord and Tenant, p. 1570; Bronson on Fixtures, Sect. 30.

[4] Walmsley v. Milne, 7 C. B. N. S. 115 (1859); Longbottom v. Berry, L. R. 5 Q. B. 123 (1869); Climie v. Wood, L. R. 4 Exch. 328 (1869); Holland v. Hodgson, L. R. 7 C. P. 328 (1872); Day v. Perkins, 2 Sandf. Ch. 359 (N. Y., 1845); Butler v. Page, 7 Met. 40 (Mass., 1843); Jones on Mortgages, Vol. I, Sect. 441; Bronson on Fixtures, Sect. 62; Amos and Ferrard on Fixtures, Third Edition, p. 293; Tyler on Fixtures, pp. 561, *et seq.*